No. 83-1513

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MOUNT DIABLO COUNCIL OF THE BOY SCOUTS OF AMERICA,
Appellant,

v.

TIMOTHY CURRAN,
Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF OF APPELLANT IN OPPOSITION TO THE MOTION TO DISMISS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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The Mount Diablo Council of the Boy Scouts of America ("the Council") files this brief in opposition to Timothy Curran's Motion to Dismiss.[1]

ARGUMENT

Curran makes no effort to argue that this appeal fails to present a substantial federal question. Instead, he asserts only that the decision below is not a "final judgment or decree" within the meaning of 28 U.S.C. § 1257. As the Council's Jurisdictional Statement explains, however, the decision of the Court of Appeal falls squarely within the statutory test of finality, as amplified by this Court in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). *See* JS 2-6.[2]

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[1] The listing required by Supreme Court Rule 28.1 appears in the footnote on page i of Appellant's Jurisdictional Statement.

[2] Citations to "JS" in this brief are to the Council's Jurisdictional Statement. "JS App." refers to the Appendices to the Statement.

1. Curran concedes that the Court of Appeal explicitly stated that the Boy Scouts of America is a "business establishment" within the meaning of the Unruh Act, California Civil Code § 51, and that the statute hence prohibits the Boy Scouts from excluding a person from membership because he is a homosexual. Motion To Dismiss at 3-4. In addition, the court below stated with equal clarity that, under common law principles, *no* private organization may expel a member because he is a homosexual. *See* JS App. 8a-10a. Curran also does not dispute that, in reaching those conclusions, the court addressed and rejected the Council's constitutional objections to application of the statute and common law as so construed. *Id.* 16a-19a, 21a. There is nothing tentative or contingent about the state court's decision that, despite these constitutional objections, the Unruh Act and the State's common law control the membership policies of the Boy Scouts.

Nevertheless, Curran argues that the decision below is not final within the meaning of 28 U.S.C. § 1257 because the state courts have the power to reconsider the holding on a later appeal and this case does not fall within any "exception" to the statutory requirement of finality set out by this Court in *Cox Broadcasting*. Motion to Dismiss at 4-15.

In *Cox Broadcasting*, however, this Court did not set out an exception to the finality requirement; rather, the Court analyzed the circumstances in which a decision that does not end the litigation nevertheless constitutes a "final" decision of the federal claims. The Court held that the term "final judgment" as used in Section 1257 does not require that the state court proceedings be at an end. 420 U.S. at 477. The Court did not hold that the state court must be powerless to reconsider its determination. Instead, the Court allowed the appeal on the ground, *inter*

alia, that the state court's decision on the federal issues was, as a practical matter, "plainly final." *Id.* at 485.

Here, the decision below is "plainly final" in the same sense, particularly in light of the California Supreme Court's denial of review. Curran does not address the decisions cited in the Jurisdictional Statement showing, once the California Supreme Court has denied review, as here, that the Court of Appeal will adhere to its own ruling during any later appeal absent truly extraordinary circumstances, that other California courts will treat the decision below as settling these constitutional issues unless and until the California Supreme Court chooses to overrule the decision, and that on a later appeal the California Supreme Court itself ordinarily will treat the issues as if they had been finally decided on the merits. JS 3-4.

As explained in the Jurisdictional Statement, the other factors on which this Court relied in *Cox Broadcasting* in determining whether a case falls within the Court's appellate jurisdiction are all present in this case: (1) if the Court of Appeal's ruling on the constitutional issues was erroneous, there should be no trial at all; (2) if the Council prevails on a non-constitutional ground at trial, the decision below will remain as precedent, binding the state courts and casting a shadow over other membership associations in similar circumstances; and (3) failure to accept review at this juncture, and leaving this possibly erroneous precedent to stand, will threaten substantial erosion of a fundamental federal policy—in *Cox Broadcasting*, the freedom of speech; in this case, the freedom of association. *See* JS at 4-5.

2. Curran also argues that no significant federal policy within the meaning of *Cox Broadcasting* is at issue in this appeal. His argument rests on an attempt to downplay the impact of the California Court of Appeal's decision. He repeatedly insists, for example, that the the decision below will not significantly affect the freedom of

association because the ruling excludes "*strictly* private clubs or institutions" from the statute's reach (JS App. 17a). Motion To Dismiss at 10-11, 14.

Even if accurate, however, Curran's assertion would not substantially affect either the finality or the importance of the decision below. Holding that the only organizations outside the statute's intrusive coverage are "*strictly* private clubs or institutions" means, at the very least, that the State can dictate the membership requirements of organizations serving political or religious purposes and other organizations with characteristics subject to the strongest First Amendment protections. Brief of the Boy Scouts of America as Amicus Curiae in support of Affirmance, filed in *Roberts v. The United States Jaycees,* No. 83-724, *prob. juris. noted,* 52 U.S.L.W. 3509 (U.S. January 9, 1984), at 18.

Moreover, exclusion of "*strictly* private" associations from the reach of the Unruh Act offers little guidance and less constitutional comfort. Simply stating that some unspecified body of "*strictly* private" groups remain unaffected by the ruling below begs the fundamental question. The State claims the right to label non-profit membership associations with the characteristics of the Boy Scouts as "business establishments" and hence to subject them to regulation of their membership criteria. That assertion of power threatens to erode an important federal policy—the constitutional right to freedom of association. That issue is not resolved simply by saying that an undefined class of associations different in some unknown ways from the Boy Scouts will not be covered by the challenged Act.

In a further effort to limit the significance of the decision below, Curran claims that, on the common law cause of action, the court below merely held that "one may not be arbitrarily expelled from an organization whose membership requirements . . . he has not violated. . . . " Motion To Dismiss at 9. There is nothing in the court's opinion, however, that states or implies that the

holding is so limited. The court nowhere even discussed whether or not Curran violated any membership requirement. Rather, the court held that, as a matter of substantive law, "an expulsion from an association on the basis of a person's status as a homosexual is both capricious and offensive to public policy" and hence violates California common law. JS App. at 8a. That ruling applies to all associations in California.

3. Curran cites other California state court decisions to suggest that "specialized institution[s]" may have "reasonable" regulations "rationally related to the services performed." Motion to Dismiss at 12. Even if that principle were superimposed on the decision below, it would not cure the decision's fundamental constitutional infirmity. A group protected by the freedom of association cannot be put to the burden of proving that its membership criteria are functionally related to some activity in which it engages. Such a test would turn the constitutional right on its head by requiring the citizens who are protected by the Constitution to justify the exercise of their rights, rather than requiring the State to carry its burden of showing a compelling justification for restricting those rights. In the absence of such proof by the State, an organization protected by the freedom of association should be able to adopt any membership criteria its members believe are appropriate. *See* Brief of the Boy Scouts of America as Amicus Curiae in Support of Affirmance, filed in *Roberts v. The United States Jaycees, supra,* at 16-17, 22, 27. Otherwise, the constitutional right is left with little content.

4. Despite Curran's unsupported assertion to the contrary, Motion to Dismiss at 14, the Court of Appeal's ruling will bar membership criteria based on gender, because "sex" is both a classification based on "status," and thereby subject to the same analysis under the

common law rule, and one of the classifications expressly barred under the Unruh Act. California Civil Code § 51. Similarly, Curran asserts without explanation that other federally chartered organizations with selective membership policies need not be affected by the court's ruling. Motion to Dismiss at 14-15. Curran does not explain why the Court of Appeal's decision would not apply to the many such organizations that exclude people on the basis of gender or other status classifications.

5. Finally, in his only oblique reference to the substantiality of the constitutional issues, Curran accuses the Council of being "grossly misleading" in its discussion of *Schwenk v. Boy Scouts of America,* 551 P.2d 465 (Or. 1976). Curran disputes the Council's statement that the Oregon court interpreted its public accomodations law as inapplicable to the Boy Scouts when confronted with these same constitutional objections. Motion To Dismiss at 15. In fact, however, as the dissenting opinion in *Schwenk* explicitly recognized, the Boy Scouts raised the very constitutional issues present in this case—freedom of association and the Supremacy Clause—in arguing that, if the Oregon public accommodations law were interpreted as requiring the Boy Scouts to admit girls, the statute would be unconstitutional. 551 P.2d at 475-76 (O'Connell, J., dissenting). Faced with those arguments, the Oregon Supreme Court avoided the constitutional conflicts by holding that the statute did not apply to the Boy Scouts' membership policies. The California court, by contrast, reached the opposite conclusion in interpreting its statute and thus squarely framed the substantive constitutional questions that are now before this Court.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted.

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April 1984